Supreme Court, U.S.
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(1)

No. _____

In The
Supreme Court of The United States
October Term 1996

FRANCES L. KEARNS
Petitioner,

v.

MARVIN T. RUNYON, JR., et al,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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75 pp

QUESTIONS PRESENTED FOR REVIEW

The Rehabilitation Act prohibits adverse employment actions from being taken against individuals based upon their "relationship or association" with qualified disabled persons under 29 U.S.C. § 794 (d). The Drexel Postmaster received approval to hire an additional clerk at the Drexel Post Office based upon the sole reason that Frances L. Kearns may need to be gone to care for her aged parents. The resources of the USPS are structured so that any staffing problem can be easily accommodated. No historical staffing problems occurred for 27 years prior to hiring the additional employee. This basis for hiring is a precluded discriminatory reason and as admitted by Cheryl Deakins was the sole reason for her granting approval of the Postmaster's request. This precluded discriminatory reason ultimately culminated in the hiring of the second employee and accordingly reduced the hours of Frances L. Kearns.

The question presented is:

A. Did the appellate court properly conclude that the decision to hire an additional employee was not an adverse employment action under the Rehabilitation Act, when a direct admission was made by the supervisor that the sole reason for her approval was the "relationship or association" of Frances L. Kearns with her aged and disabled parents?

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceedings below and before this Court are the Petitioner, Frances L. Kearns, and the Respondents, Marvin T. Runyon, Jr., Postmaster General, United States Postal Service.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner Frances L. Kearns respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals For The Eighth Circuit, which entered its Decision on June 3, 1997.

OPINIONS BELOW

In this matter, there are three unreported decisions and/or orders from the courts below, each of which is reproduced in the accompanying appendices. The United States Court of Appeals For the Eighth Circuit's Order, entered June 3, 1997, Denying Petition for Rehearing and Suggestions for Rehearing En Banc. (Apdx. D-20). The United States Court of Appeals For the Eight Circuit's order affirming the dismissal filed April 2, 1997. (Apdx. A-1). The United States District Court's Judgment entered on April 2, 1996. (Apdx. C-18). The United States District Court's March 25, 1996 order dismissing the Rehabilitation Act claim. (Apdx. B-4).

JURISDICTION

The judgment of the Court of Appeals for The Eighth Circuit was entered on June 3, 1997, affirming the dismissal

of Petitioner's complaint.

Pursuant to Rule 13.1 of the rules of the Supreme Court of the United States, Frances L. Kearns has filed this Petition for Writ of Certiorari within 90 days after the entry of the United States Court of Appeals For The Eighth Circuit's order denying the Petition for Rehearing and Suggestions for Rehearing En Banc.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254. The Order of the district court from which an appeal was taken to the Court of Appeals was a final order, and jurisdiction in the Court of Appeals was proper under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Rehabilitation Act of 1973, 29 U.S.C. § 701 et. seq., specifically 29 U.S.C. § 794(d) provides in pertinent part:

> "(d) Standards used in determining violation of section
>
> The standards used to determine whether this section has been violated in a complaint alleging employment

discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 et. seq.) And the provisions of sections 501 through 504, and 510 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12201-12204 and 12210), as such sections relate to employment." Emphasis Added.

The Americans with Disabilities Act 42 U.S.C. § 12111 et. seq., specifically 42 U.S.C. § 12112(b) (4) states:

"(b) Construction

As used in subsection (a) of this section, the term 'discriminate' includes---

> (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;"

29 C.F.R. § 1630.8 is set forth verbatim in the Appendix. (Apdx. E).

Additionally, 28 U.S.C. § 1254 provides as follows:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

STATEMENT OF THE CASE

Frances L. Kearns has been continually employed by the United States Postal Service since 1966. In April, 1993, the Drexel Postmaster told Frances L. Kearns that "he" was hiring another part-time flex clerk and that her hours of employment would be reduced. On June 29, 1993, Respondent's employee, Postmaster Rodney Callen, advised Frances L. Kearns that the additional employee had been hired and that Ms. Kearns' hours would be cut after she trained the additional employee. On July 2, 1993, Frances L. Kearns was given written notification of the reduction in her hours.

On July 27, 1996, Frances L. Kearns filed an allegation of Discrimination Based on Age and on August 23, 1993, Frances L. Kearns filed a formal complaint of Age discrimination with the Equal Employment Opportunity Commission. The complaint was amended to include a claim concerning the violation of the Rehabilitation Act, 29 U.S.C. § 794(d), as the discovery process disclosed this violation. Depositions were taken from Respondent's employees, Rodney Callen (The Drexel Postmaster), Cheryl Deakins (The Drexel Postmaster's Supervisor), and, Connie Allen (Administrative personnel supervisor), in which admissions were made concerning the reason for Frances L. Kearns'

reduction in hours. The sole reason given for Petitioner's reduction in hours was because of Frances L. Kearns' "relationship or association" with her aged parents, and the misconception that Frances L. Kearns may need to be gone to care for them. This reason which was given in Deposition by Cheryl Deakins was also confirmed by her at the Administrative Hearing.[1] No historical problems (Post Office closing, mail cut-offs being missed, excessive overtime being paid, vacation or time off situations being a problem because of the lack of employee coverage) existed to support the fact that Frances L. Kearns had ever taken any time off to care for her aged parents to the determent of the Drexel Post Office throughout her 27 year tenure with the Drexel Post Office.[2]

The instant case proceeded to an Administrative hearing on May 9, 1994, where testimony and evidence were presented to support the claims of a violation of the "ADEA," and the Rehabilitation Act. A bench decision was rendered on May 12, 1994, by Administrative Law Judge Tatjana Schwendinger, finding that Frances L. Kearns had failed to prove a prima facie case based on a disproportionate impact theory (a theory that was not presented at the Administrative

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[1]Deposition and Administrative Hearing Testimony of Cheryl Deakins. (Apdx. G 28-37 and G 45-47).

[2]Administrative Hearing Stipulation verifying no problems in past. (Apdx. G 43, 44).

hearing to support Frances L. Kearns' claim) under the "ADEA;" and, that Frances L. Kearns had failed to prove a prima facie case under the Rehabilitation Act as the remarks by the Postmaster about Frances L. Kearns' aged parents did not constitute an "unlawful motive" and the remarks were only a "hypothetical reason as to why she might need to be absent on occasion."

In fact this "hypothetical reason" was the sole reason given by Postmaster Callen to his supervisor, Cheryl Deakins, for needing to hire an additional part-time flexible clerk.[3] Cheryl Deakins in turn communicated that fact to Bob Kessler, the Post Office Union representative.[4] Hence, this was much more than a "hypothetical reason," it was the heart of the decision by Cheryl Deakins to allow the Postmaster to hire an additional employee and subsequently reduce Frances L. Kearns' hours.

A final agency decision in Respondent's favor was rendered on the above referenced claims on July 25, 1994. On September 12, 1994, a Complaint was filed IN THE UNITED STATES DISTRICT COURT FOR THE

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[3]Deposition and Administrative Hearing Testimony of Cheryl Deakins. (Apdx. G 28-37 and G 45-47).

[4]Apdx. G 30, 31, 36 and 37.

WESTERN DISTRICT OF MISSOURI alleging a violation of the "ADEA," 29 U.S.C. § 621 et. seq., the Rehabilitation Act, 29 U.S.C. § 701 et. seq., and the Missouri Human Rights Act, R.S.Mo. § 213.055. A final ORDER was filed on March 25, 1996, and JUDGMENT entered on April 2, 1996, dismissing the Rehabilitation Act and Missouri Human Rights claims, and, Petitioner's demand for a jury trial and request for liquidated damages were stricken. (Apdx. B-4 and C-18).

The "ADEA" claim was left intact and went to trial on April 1, 1996. At trial, on cross examination, Respondent's counsel contended that a legitimate non-discriminatory reason for the adverse employment action against Frances L. Kearns was that her "relationship or association" with her aged parents might cause her to be gone to care for them. This argument was presented without legal concern because the Rehabilitation Act claim had been dismissed by Summary Judgment.[5] Respondent's oral motion for a directed verdict was sustained at the close of Petitioner's case. The JUDGMENT in this Civil case was entered on April 2, 1996.

Frances L. Kearns appealed the ORDER dismissing

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[5]Trial transcript whereby "relationship and association" of Frances L. Kearns with her aged parents was presented by U.S. Attorney without legal concern because the ADEA claim was the only claim being litigated. (Apdx. F 24-27).

the Rehabilitation Act claim 29 U.S.C. 701 et. seq. On May 20, 1996, entered as a FINAL JUDGMENT on April 2, 1996, because the ruling was inconsistent with the law; and, the Eighth Circuit Affirmed on April 2, 1997 and entered a Final Order on June 3, 1997.

The basis for federal jurisdiction in the court of first instance was 28 U.S.C. § 1331, § 1332 and § 1339.

REASONS FOR GRANTING THE WRIT

THE ACTION OF THE COURT OF APPEALS IN IGNORING THE SOLE REASON OR THE UNJUSTIFIED CONSIDERATION OF THE "RELATIONSHIP OR ASSOCIATION" OF FRANCES L. KEARNS WITH HER AGED AND DISABLED PARENTS FOR THE ADVERSE ACTION TAKEN AGAINST THE PETITIONER IS INCONSISTENT WITH THE LAW

The Court of Appeals wrote:

"We find that the USPS's actions in hiring a second clerk and reducing Kearns's hours accordingly did not constitute and adverse employment action that violated the Rehabilitation Act. Kearns was guaranteed only two hours of work per pay period, and the USPS provided unrebutted evidence that a second clerk was hired to enable the post office to remain open in the event both the postmaster and Kearns were absent. Cf. Burns v. City of Columbus, 91 F.3d 836, 841-42 (6th Cir. 1996) (handicap may not be sole reason for adverse employment action)."

This analysis is patently incorrect and capitates established legal analysis by circumventing established legal principles. In some cases the law allows relying upon the handicap or a "relationship or association" situation, if the individual is unable to perform an essential function of the job because of a legally qualified disability or "relationship or association" situation. The law is clear that use of the nontraditional evidentiary method set forth in McDonnell Douglas/Burdine applies absent direct evidence, or, wherein direct evidence for the decision is because of the handicap the burden-shifting approach is inapplicable.[6]

The Eighth Circuit has failed to utilize either. The statement: "enable the post office to remain open in the event both the postmaster and Kearns were absent," was rebutted the instant the USPS representatives mentioned the "relationship or association" situation. The Eighth Circuit indicates that Respondents offering the "staffing" reason was the all inclusive end for the USPS notwithstanding Cheryl Deakins' admission. The failure to argue that Frances L. Kearns was not otherwise qualified is fatal for the USPS given Cheryl Deakins' admission. Whether the burden-shifting approach is utilized or not the established law

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[6]Cf. Burns v. City of Columbus, 91 F.3d 836, 841-43 (6th Cir. 1996, McDonnell Douglas Corp. V. Green, 411 U.S. 792, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248.

requires that a determination be made as to whether or not the individual is qualified for the position or program despite the handicap or "relationship or association" with the handicapped individual. The USPS stipulated that Frances L. Kearns has an exemplary employment history which bolsters the fact that she is otherwise qualified. The admission by Cheryl Deakins encompassed an unjustified consideration of the "relationship or association" with the handicapped and aged individuals.

The Eighth Circuit imports that no direct evidence of discriminatory intent exists and that the second level of the Title VII burden-shifting analysis is the all inclusive end. Herein we have direct evidence and therefore the second level requires the USPS to argue that Frances L. Kearns was not otherwise qualified. The USPS cannot now say they never mentioned or unjustifiably considered the "relationship or association," and furthermore they stipulated that Frances L. Kearns was otherwise qualified.

The sole reason for Cheryl Deakins' approval was the unfounded factual conclusion that Frances L. Kearns may need to be gone to care for her aged and disabled parents. Even if Cheryl Deakins' admission is not considered the sole reason for the adverse action, the law requires a determination as to whether or not Frances L. Kearns was otherwise

qualified to do her job, despite her "relationship or association" with her aged parents. The established law does not stop the analysis before this determination is made. The law requires much more than resting upon the remote possibility that a qualified individual potentially may not be able to perform their job. This misconception was not tantamount to an actual attribute of the "relationship or association" inherent to Frances L. Kearns with her aged and disabled parents. Also, this was a speculative unjustified consideration of the "relationship or association" that Frances L. Kearns had with her aged and disabled parents. Additionally, this stereotypical assessment by the USPS is clearly prohibited by law.

The law is clear that the handicap or the "relationship or association" with a handicapped individual, must make the individual unable to perform an essential function of the job. The Post Office stipulated to the exemplary performance of Frances L. Kearns. The Eight Circuit completely abrogated the requirement of: "whether the individual is qualified for the position or program despite the handicap," or "relationship or association" with a handicapped individual.

The law is based on common sense in that if you are handicapped or have a "relationship or association" with a handicapped individual, and, you are unable to perform an

essential function of the job because of this situation, an adverse action because of this may be allowed. Conversely, if you are able to perform the essential functions of the job notwithstanding your handicap or "relationship or association" with the handicapped individual, an adverse action is precluded.

If the decision was not solely based upon Frances L. Kearns' "relationship or association" with her aged parents then under the Eighth Circuit's analysis a pretextual contract reason offered by an employer coupled with an admitted discriminatory reason would serve to shield an employer from the proscriptions of the Rehabilitation Act. This analysis imports that if the employer alleges they contractually have the right to make an employment decision and admits that the sole reason, or additional reason, for their decision is a precluded discriminatory reason, then it can be done without the additional requirement as to whether or not the individual is otherwise qualified.

The USPS clearly fails under either analysis because they brought the "relationship or association" issue into the decision making process and then stipulated that Frances L. Kearns was otherwise qualified, instead of arguing that she was unqualified because of her "relationship or association." The Eighth Circuit's ruling is inconsistent with the

current law.[7]

The sole reason for the hiring of the second employee as admitted by Cheryl Deakins was based upon Frances L. Kearns' "relationship or association" with her aged parents, a violation of the Rehabilitation Act. Substantial testimony inundates the record rebutting the alleged legitimate non-discriminatory reason offered by Respondent specifically the numerous resources available for staffing purposes in the USPS, the exemplary record of Frances L. Kearns and the USPS' unjustified consideration of the "relationship or association" situation.[8] This over-night potentially dangerous staffing situation had not posed any problems to the Drexel

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[7]Braverman v. Penobscot Shoe Co. 859 F. Supp. 596 at 605, (D.Me. 1994), Cf. Burns v. City of Columbus, 91 F.3d 836, 841-43 (6th Cir. 1996), (sole reason: then whether individual is qualified despite handicap or "relationship or association"; not sole reason coupled with direct evidence: respondent must argue that petitioner is unqualified because of handicap or "relationship or association") Doe. V. New York University, 666 F.2d 761, 774-775 (2nd Cir. 1981), Lovelace v. Sherwin Williams Co., 681 F.2d 230 (CA4 N.C. 1982) (meeting employer's legitimate expectations and reduced subsequent to hiring of new employee is precluded), Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1387 (10th Cir. 1981), Norcross v. Sneed, 755 F.2d 113, 116-117 (8th Cir. 1985), Tyndall v. National Educ. Centers, 31 F.3d 209, at 214 (4th Cir. 1994) (cannot assume that there may be future absences).

[8]Loaners and Numerous clerks are available from other installations to facilitate proper staffing; also, a Part-Time Flexible Clerk Pool exists to allow Part-Time Clerks to take advantage of additional hours when needed.

Post Office for almost three decades.[9] This bolsters the fact that Frances L. Kearns was otherwise qualified and furthermore, her parents did not become aged and disabled over-night.

Under 28 U.S.C. § 1291, Petitioner had a right to appeal this adverse determination. The Western District Court failed to consider the additional protection of "relationship or association" situations afforded by the amendments to the Rehabilitation Act of 1992, specifically 29 U.S.C. § 794(d), and, the Eighth Circuit affirmed for a completely separate and distinct reason. Both rulings are inconsistent with the current law. The Eighth Circuit's ruling completely circumvents an individuals ability to prevail in situations by proving that the reasons offered were based upon unfounded factual conclusions, or, misconceptions, and the reasons articulated encompass an unjustified consideration of the handicap or in this case the "relationship or association" with the handicapped individual, because, even with a blatant admission precluded by law their analysis prevents a fair determination, and, the Eighth Circuit completely abrogated the requirement of whether or not

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[9]The Postmaster admitted that no Post Office closings had occurred because of Frances L. Kearns. (Apdx. G 38-40).

Frances L. Kearns was otherwise qualified.[10] For the Court of Appeals to conclude that no adverse employment action transpired that violated the Rehabilitation Act is in direct conflict with decisions of other circuits.

CONCLUSION

Petitioner Frances L. Kearns prays that this Court grant this Petition and issue a Writ of Certiorari to review the Judgment of the United States Court Of Appeals for the Eighth Circuit in this Matter.

Respectfully submitted,

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[10] *See footnote 7.*

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

OPINION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2435

Frances L. Kearns,	)	
	)	
Appellant,	)	Appeal from the
	)	United States
vs.	)	District Court for
	)	the Western District
Marvin T. Runyon, Jr.,	)	of Missouri.
Postmaster General,	)	
United States Postal	)	(UNPUBLISHED)
Service,	)	
	)	
Appellee.	)	

Submitted: March 7, 1997

Filed: April 2, 1997

Before BOWMAN, WOLLMAN, and BEAM, Circuit Judges.

PER CURIAM.

Frances L. Kearns appeals the district court's[1] grant of summary judgment to the United States Postal Service (USPS) on her claim under the Rehabilitation Act, 29 U.S.C. § 701 et seq. We affirm.

Kearns was a part-time flex clerk (PTF clerk) at the Drexel, Missouri facility. As such, she was guaranteed two hours of employment every two weeks, but from 1976 to 1993, she had worked approximately nineteen hours per week. In 1993, a second PTF clerk was hired, and Kearns's hours were reduced to approximately twelve or fourteen per week. As relevant to this appeal, Kearns claimed the reduction was based on her relationship with her disabled parents, in violation of the Rehabilitation Act.

This court reviews the district court's grant of summary judgment de novo, applying the same standard as the district court; summary judgment is appropriate when, viewing the record in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Earnest v. Courtney, 64 F.3d 365, 366-67 (8th Cir. 1995) (per curiam).

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[1]The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri.

We find that the USPS's actions in hiring a second clerk and reducing Kearns's hours accordingly did not constitute an adverse employment action that violated the Rehabilitation Act. Kearns was guaranteed only two hours of work per pay period, and the USPS provided unrebutted evidence that a second clerk was hired to enable the post office to remain open in the event both the postmaster and Kearns were absent. Cf. Burns v. City of Columbus, 91 F.3d 836, 841-42 (6th Cir. 1996) (handicap may not be sole reason for adverse employment action).

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

FRANCES L. KEARNS,	)	
	)	
Plaintiff,	)	
	)	Case No.
vs.	)	
	)	94-0844-CV-W-3
MARVIN T. RUNYON, JR.,	)	
Postmaster General,	)	
United States Postal Service,	)	
	)	
Defendant.	)	

ORDER

Plaintiff brought this action against her employer, the United States Postal Service ("USPS" or "defendant"), under the Age Discrimination in Employment Act ("ADEA"), 28 U.S.C. § 621 et. seq., the Rehabilitation Act, 29 U.S.C. § 701 et. seq., and the Missouri Human Rights Act, R.S.Mo. § 213.055. The relevant facts of the case are as follows:

Plaintiff has been employed by the USPS at its Drexel, Missouri facility since 1966. During this time, plaintiff has held the position of a part-time flexible clerk ("PTF clerk").

As a PTF clerk, plaintiff is only guaranteed two hours of employment every two-week pay period. However, from 1976 to 1993, plaintiff worked approximately nineteen hours per week.

The USPS rates its facilities at levels, which are based upon the size of the population the facility serves and the amount of revenue the facility receives. The Drexel post office is a Level 15 post office. Most level 15 post offices employ 2 PTF clerks as well as the postmaster of the facility. Since 1983, the Drexel post office employed only one PTF clerk, the plaintiff, and the postmaster, Rodney Callen.

On April 20, 1993, Postmaster Callen submitted a written request for a second PTF clerk for the Drewel facility. Ultimately, Francis Brown was hired for the position. Once Ms. Brown was hired, plaintiff's hours were reduced from approximately nineteen hours per week to approximately fourteen hours per week.

Plaintiff brought this action alleging that the hiring of Ms. Brown and subsequent reduction in plaintiff's hours was a violation of the ADEA, the Rehabilitation Act and the Missouri Human Rights Act. Pending before the Court is

defendant's Motion for Summary Judgment on these claims.[1]

SUMMARY JUDGMENT STANDARD

A moving party is entitled to summary judgment on a claim only if there is a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See generally Williams v. City of St. Louis, 783 F.2d 114, 115 (8th Cir. 1986). "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." Anderson v. Liberty Lobby, Inc., 477 U.S. 247, 248 (1986); see also Get Away Club, Inc. V. Coleman, 969 F.2d 664 (8th Cir. 1992).

A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of the ... pleadings, but ... by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(3). Additionally,

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[1]Plaintiff's "Motion in Opposition to Defendant's Motion for Summary Judgment, and Plaintiff's Motion for Summary Judgment with Supporting Suggestions and Supporting Affidavit" appears to request summary judgment as to plaintiff's claims. However, the Motion does not contain sufficient argument and citation to merit summary judgment and is therefore denied.

in applying this standard, the Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. Matsushita Electric Indus. Co. V. Zenith Radio Corp., 475 U.S. 574, 588-89 (1966); Tyler v. Harper, 744 F.2d 653, 655 (8th Cir. 1984), cert. Denied, 470 U.S. 1057 (1985).

ADEA CLAIM

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court set out the "now familiar burden shifting framework which establishes the 'order and allocation of proof in the trial of employment discrimination suits." Krenick v. County of Le Sueur, 47 F.3d 953, 957 (8th Cir. 1995). This framework applies to cases under the ADEA and is used in analyzing the merits of a summary judgment motion. Id.

First, the plaintiff must demonstrate the ability to prove the elements of a prima facie case under the ADEA. Id. Thus, in this case, the record must demonstrate that the plaintiff can prove:

1) that she is a member of the protected age group under the ADEA;

2) that she was performing satisfactory work and met the legitimate expectations of her employer;

3) that despite the adequacy of her work, her employer took an adverse employment action against her;

4) that her position was filled by a younger person.

Despite defendant's argument to the contrary, it is clear to the Court that plaintiff has met the initial burden of establishing a prima facie case under the ADEA. There is no dispute that plaintiff was 58 years old at the time Ms. Brown was hired, thus placing plaintiff within the protected age group under the ADEA. 29 U.S.C. § 631 (Transcript of EEOC Hearing (hereinafter Tr. p. 199). There is also no dispute that plaintiff's work was satisfactory. (Deposition of Rodney Callen at pp. 26-27.) Addressing the fourth element, there is no dispute that Ms. Brown is younger than the plaintiff in that at the time she was hired, Ms. Brown was 41 years old. (Tr. p. 101)

Defendant contends that plaintiff cannot establish the third element for a prima facie case because there was no adverse employment action taken against her. Under USPS guidelines, the Drexel office, as a Level 15 facility, is entitled

to 2 PTF clerks. Additionally, a PTF clerk is only guaranteed 2 hours of work per pay period. Plaintiff admits she is working fourteen hours per week, which is more that the guaranteed minimum. Also, plaintiff is working more hours than Ms. Brown. Because of these facts, defendant contends that no adverse employment action has been taken against plaintiff.

The Court does not agree. The uncontroverted facts establish that plaintiff was working approximately nineteen hours per week as the sole PTF clerk in the Drexel facility. Following the hiring of Ms. Brown, plaintiff's hours were reduced to approximately fourteen hours per week. This is sufficient to show that an adverse employment action was taken against plaintiff. There is no requirement that plaintiff establish that Ms. Brown is working more hours than plaintiff, merely that plaintiff was adversely affected by the hiring of Ms. Brown. Thus, plaintiff has established a prima facie case under the ADEA which creates a rebuttable presumption of discrimination. Krenick at p. 958.

Continuing with the McDonnell Douglas analysis, once plaintiff has established a prima facie case, the burden shifts to the defendant who must rebut the presumption of discrimination by producing evidence that the adverse action against the plaintiff was taken because of a legitimate,

nondiscriminatory reason. Krenick at p. 958. This burden is only of production and not proof. Id. Thus, defendant need only to provide evidence sufficient to sustain a judgment in its favor.

In requesting authority to hire a second PTF clerk, Postmaster Callen submitted a written request to fill the position. Postmaster Callen requested the second clerk because:

> We have been one clerk short for several years. We have only one clerk. If I have only one clerk, we are in the potential dangerous (sic) situation. If my clerk or myself should become sick or have an emergency, there is no one to fill our vacancy.

(Tr. 152-54, 213; defendant's exhibit 3, p. 1)

Because defendant's burden is only of production and not proof, the testimony of Postmaster Callen is sufficient to satisfy defendant's burden because it is sufficient to satisfy a judgment in its favor.

Finally, under the McDonnell Douglas analysis, once the defendant has met its burden of production, the burden shifts back to the plaintiff. The plaintiff must establish the existence of facts which if proven at trial would permit a jury

to conclude that the defendant's proffered a reason is pretextual and that the intentional discrimination was the true reason for the defendant's actions. Id.

Plaintiff testified at the EEOC hearing that Postmaster Callen has made comments regarding her age. (Tr. p. 93) Additionally, Robert Kessler, the National Business Agent for the American Postal Workers Union, testified at the EEOC hearing that in one of his conversations with Cheryl Deakins, Postmaster Callen's supervisor, "reference was made to the fact that Frances was either getting up in age or that she wasn't exactly young herself any more, that she might possibly have to be off herself because she was getting older ..." (Tr. P. 124) These facts, if proven at trial, provide the basis for the fact finder to conclude that the defendant's proffered reason is pretextual and that intentional discrimination was the true reason for the hiring of Ms. Brown and subsequent reduction in plaintiff's hours. Plaintiff has satisfied her burden under the final stage of the McDonnell Douglas analysis. Thus, summary judgment in favor of the defendant on plaintiff's ADEA claim is not appropriate and is DENIED.

JURY TRIAL AND LIQUIDATED DAMAGES

In her Complaint, plaintiff made her demand for a jury

trial on her claims defendant argues that plaintiff is not entitled to a jury on her ADEA claim. In Lehman v. Nakashian, 453 U.S. 156 (1981), the Supreme Court held that there is no right to a jury trial for federal employees suing the government under the ADEA. Id. At 168. In that case, a civilian employee of the Department of Navy brought an ADEA suit against the Department of Navy. The Supreme Court, in an extensive analysis of the ADEA, reasoned that because Congress expressly provided for jury trials under the ADEA in the section of the Act applicable to private-sector employers but did not so provide in the section applicable to the federal government as employer, Congress did not provide for a jury trial when it waived its sovereign immunity. Id.

Plaintiff argues that the USPS is not a governmental agency and should not be treated as such. Rather, it is a quasi-governmental organization which is amendable to judicial process as is a private enterprise.

Section 633a of the ADEA specifically applies the provisions of the ADEA to the USPS. 29 U.S.C. § 633a(a). Further, section 633a(f) specifies that the USPS and other entities identified in 633a(a) are not subject to any other provisions of the ADEA other than section 631(b) and the remaining provisions of 633a. Thus, the provision in section 626(c)(2) of the ADEA which provides for a jury trial in cases

against private sector employers does not apply to the USPS. Therefore the Court is satisfied that a jury trial is not available to plaintiff in this case. See, Grandison v. USPS, 696 F. Supp. 891 (S.D.N.Y. 1988).

Further in her Complaint, plaintiff requests liquidated damages for defendant's alleged willful violation of the ADEA. The same reasoning above applies to prohibit such relief. Section 626(b) of the ADEA provides that "liquidated damages shall be payable only in cases of willful violations of this chapter." Because the USPS is not subject to this provision pursuant to section 663a(f), plaintiff may not recover liquidated damages for her ADEA claim. See also, Grandison infra.

REHABILITATION ACT CLAIM

Rehabilitation Act discrimination cases are analyzed under the McDonnell Douglas burden shifting analysis. Crawford v. Runyon, 37 F.3d 1338 (8th Cir. 1994). As discussed above, plaintiff must first demonstrate the ability to prove the elements of a prima facie case under the Rehabilitation Act.

The first element that plaintiff must establish in her prima facie case is that she is a member of the protected

group under the Act. Section 794(a) of the Act provides that "no otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, ... be subjected to discrimination ... under any program or activity conducted ... by the United States Postal Service ..." A qualified individual with a disability means an individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment. 29 U.S.C. § 706(8)(B).

Nowhere does plaintiff claim, much less establish, that she is an individual with a disability as defined by the Rehabilitation Act. Rather, plaintiff rests her claim upon the fact that she falls within a protected class under the Act by virtue of her relationship with such individuals, namely her relationship with her aged parents. Plaintiff's argument is based upon a definition of "discrimination" as set forth in the American with Disabilities Act ("ADA"). See 42 U.S.C. § 1211 et seq. The Court is not persuaded by plaintiff's argument. The Rehabilitation Act applies only to those individuals as defined by the Act. Although Congress mandated that standards included in the ADA are to be applied in Rehabilitation Act cases, 29 U.S.C. § 794(d), Congress did not broaden the applicability of the

Rehabilitation Act by broadening the definition of the Act to include individuals with relationships with disabled persons.

Because plaintiff is not an individual with a disability as defined by the Act, the Rehabilitation Act does not apply in this case and defendant is entitled to summary judgment on plaintiff's Rehabilitation Act claim.

MISSOURI HUMAN RIGHTS ACT CLAIMS

In addition to the remedies provided in the ADEA and the Rehabilitation Act, plaintiff claims that defendant's actions violated the Missouri Human Rights Act, R.S.Mo. § 213.055.1(1)(a). Defendant contends that the ADEA and the Rehabilitation Act provide preemptive remedies for federal employees pursuing age and handicap discrimination claims.

Title VII sets forth the sole remedy for federal employees' claims of employment discrimination. Brown v. GSA, 425 U.S. 820 (1976). The Supreme Court has recognized that certain provisions of the ADEA and the Rehabilitation Act are construed and interpreted in accordance with Title VII. Oscar Mayer and Co. v. Evans, 441 U.S. 750 (1979); Lehman v. Nakshian, 453 U.S. 156 (1981). Relying on these cases, courts have dismissed state law tort claims in ADEA and Rehabilitation Act cases. See

e.g. McGuinness v. USPS, 744 F.2d 1318, 1322 (7th Cir. 1984).

The ADEA and Rehabilitation Act set forth specific sections which apply solely to federal employees and other selected entities, including the USPS. These sections provide explicit remedies for plaintiffs alleging discrimination. In accordance with the rationale set forth in Brown, Oscar Mayer and Lehman, it is clear that these are the exclusive remedies for federal employers and pre-empt state law actions. Thus, defendant is granted summary judgment as to plaintiff's claims under the Missouri Human Rights Acts.

CONCLUSION

Based upon the above discussion, defendant's Motion for Summary Judgment (Doc. #32) is GRANTED IN PART and DENIED IN PART and plaintiff's Motion for Summary Judgment (Doc. #39) is DENIED. It is hereby ORDERED that:

1) Defendant is granted summary judgment on plaintiff's Rehabilitation Act Claim as set forth in Count II of the Complaint;

2) Defendant is granted summary judgment on

plaintiff's Missouri Human Rights Act claims as set forth in Counts I and II of the Complaint;

3) Plaintiff's demand for a jury trial and request for liquidated damages as set forth in Count III of the Complaint is stricken;

4) Defendant's Motion for Summary Judgment as to plaintiff's ADEA claim as set forth in Count I is DENIED and such claim shall remain;

5) The trial setting in this case remains intact. The trial of plaintiff's ADEA claim shall be heard by the Court commencing at 9:30 a.m. on April 1, 1996 in Room 723, United States District Courthouse, Kansas City, Missouri. The attorneys shall appear at 9:00 a.m. in chambers, Room 727, for a final pretrial conference.

Date: /s/ 03-25-'96

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

JUDGMENT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

FRANCES L. KEARNS,	)	
	)	
Plaintiff,	)	
	)	JUDGMENT IN
vs.	)	A CIVIL CASE
	)	
MARVIN T. RUNYON, JR.,	)	
Postmaster General,	)	Case Number:
United States Postal	)	94-0844-CV-w-3
Service,	)	
	)	
Defendant.	)	

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED per order filed on March 25, 1996, defendant's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART and Plaintiff's Motion for Summary Judgment is DENIED. It is hereby ORDERED that:

1) Defendant is granted summary judgment on plaintiff's Rehabilitation Act Claim as set forth in Court 2 of the Complaint;

2) Defendant is granted summary judgment on plaintiff's Missouri Human Rights Act claims as set forth in Counts 1 and 2 of the Complaint;

3) Plaintiff's demand for a jury trial and request for liquidated damages as set forth in Count 3 of the Complaint is stricken;

4) Defendant's Motion for Summary Judgment as to plaintiff's ADEA claim as set forth in Count 1 is DENIED and such claim shall remain;

On April 1, 1996, plaintiff's ADEA claim as set forth in Count 1 came before the Court, upon defendant's oral motion for judgment at close of plaintiff's case, the Court SUSTAINED defendant's motion.

Entered on 4/2/96

Date: April 2, 1996 R. F. Connor
Clerk

/s/ E. Will Feis
(By) Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ORDER

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2435WMKC

Frances L. Kearns,	)	
	)	
Appellant,	)	Order Denying Petition
	)	for Rehearing
vs.	)	and Suggestion for
	)	Rehearing En Banc
Marvin T. Runyon, Jr., etc.,	)	
	)	
	)	
Appellee.	)	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 3, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

REGULATIONS

29 C.F.R. § 1630.8
(PARTIAL)

29 C.F.R. § 1630.8 states:

"Relationship or association with an individual with a disability.

It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association."

Further direction can be found in 29 C.F.R. § 1630.8 "Appendix to part 1630-INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT," which states:

"Section 1630.8 Relationship or Association With an Individual With a Disability

This provision is intended to protect any qualified individual, whether or not that individual has a disability, from discrimination because that person is known to have an association or relationship with an individual who has a known disability. This protection is not limited to those who have a familial

relationship with an individual with a disability.

To illustrate the scope of this provision, assume that a qualified applicant without a disability applies for a job and discloses to the employer that his her spouse has a disability. The employer thereupon declines to hire the applicant because the employer believes that the applicant would have to miss work or frequently leave work early in order to care for the spouse. Such a refusal to hire would be prohibited by this provision. Similarly, this provision would prohibit an employer from discharging an employee because the employee does volunteer work with people who have AIDS, and the employer fears that the employee may contract the disease.

This provision also applies to other benefits and privileges of employment. For example, an employer that provided health insurance benefits to its employees for their dependents may not reduce the level of those benefits to an employee simply because that employee has dependent with a disability. This is true even if the provision of such benefits would result in increased health insurance costs for the employer.

It should be noted, however, that an employer need not provide the applicant or employee without a disability with a reasonable accommodation because that duty only applies to qualified applicants or employees with disabilities. Thus, for example, an employee would not be entitled to a modified work schedule as an accommodation to enable the employee to care for a spouse with a disability. See Senate Report at 30; House Labor Report a 61-62; House Judiciary Report at 38-39."

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

TRANSCRIPT
APRIL 1, 1996
(PARTIAL)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

FRANCES L. KEARNS,	)	
	)	
Plaintiff,	)	
	)	No. 94-0844-CV-W-3
vs.	)	Appeal No.
	)	Monday, April 1, 1996
MARVIN T. RUNYON, JR.,	)	Kansas City, Missouri
Postmaster General,	)	
United States Postal Service,	)	
	)	
Defendant.	)	

TRANSCRIPT ON APPEAL

BEFORE THE HONORABLE ORTRIE D. SMITH
UNITED STATES DISTRICT JUDGE,
sitting without a jury.

APPEARANCES:

FOR THE PLAINTIFF: Also appearing in person,
Mr. Darren K. Kearns
10551 Barkley, Suite 111
Overland Park, KS 66212

FOR THE DEFENDANT:	Mr. Jerry L. Short Assistant U.S. Attorney 1201 Walnut Street, Suite 2300 Kansas City, MO 64106.
COURT REPORTER:	Cynthia M. Johnson, RPR U.S. Court Reporter 811 Grand Avenue, Room 705 Kansas City, MO 64106 (816) 221-4805

Proceedings reported by computer stenography; transcript produced by computer.

*****BEGINNING ON PAGE 65 OF ORIGINAL*****

Q. Now, you testified that, obviously, Mr. Callen knew about this situation, right?

A. Yes.

Q. And I presume you probably talked to him about it?

A. In a matter of conversation I would mention their health or going to the rest home or --

Q. And now you testified that you didn't tell him that you couldn't do your job. But it would certainly be understandable for an individual whose -- who knows that an employee is having those problems, to think there might be a problem, isn't there?

A. Not necessarily because I arranged what I did for them around my work schedule and that was what I intended to do.

Q. But you would agree that most people in that kind of situation with a family member that's in ill health or that is going to need some attention is someone that's more prone to say, hey, I've got to take a day of sick leave or I've got to take a day of family leave?

A. I don't know. I'm not that way.

MR. KEARNS: Object. This line of questioning calls for speculation by the witness.

THE COURT: It does and she's testified that she doesn't know.

*****END OF PAGE 65 OF ORIGINAL*****

APPENDIX G

UNITED STATES OF AMERICA
EQUAL OPPORTUNITY COMMISSION
ST. LOUIS DISTRICT OFFICE

DEPOSITION OF CHERYL A. DEAKINS
APRIL 22, 1994
(PARTIAL)

DEPOSITION OF RODNEY A. CALLEN
APRIL 22, 1994
(PARTIAL)

HEARING TRANSCRIPT
MAY 9, 1997
(PARTIAL)

UNITED STATES OF AMERICA
EQUAL OPPORTUNITY COMMISSION,
ST. LOUIS DISTRICT OFFICE

FRANCES L. KEARNS,	)	
	)	
Complainant,	)	
	)	EEOC CASE
vs.	)	No. 2809-44095X
	)	Agency No. 4-I-604193
MARVIN RUNYON,	)	
Postmaster General,	)	
United States Postal Service,	)	
	)	
Respondent Agency.	)	

DEPOSITION OF CHERYL A. DEAKINS,
produced, sworn and examined on Friday, April 22, 1994, at the United States Postal Service, 315 West Pershing Road, Room 576, in Kansas City, Jackson County, Missouri, before:

JAMES A. LEACOCK, RPR, C.M.,
for
CROSS REPORTING SERVICE, INC.
110 South Main Street
Independence, Missouri 64050

a Notary Public within and for the State of Missouri.
Taken on behalf of the Complainant.

APPEARANCES:

For the Complainant:

MR. DARREN KEARNS
Attorney at Law
6800 College Boulevard, Suite 220
Overland Park, Kansas 66211

For the Respondent Agency:

UNITED STATES POST OFFICE
By: Mr. Randall N. Vogel
315 West Pershing Road, Room 567
Kansas City, Missouri 64108

****BEGINNING OF PAGE 11 OF ORIGINAL*****

Q. Did you ever communicate to Bob Kessler that Fran Walley Brown, who is the new part-time flex employee clerk at the Drexel post office, was approved to only work the minimum to maintain competence or proficiency?

A. I am sorry, repeat that.

Q. Did you ever communicate to Bob Kessler, the union representative, that Fran Walley Brown was approved to only work the minimum to maintain competence or proficiency?

A. No, I didn't.

Q. Did you ever communicate to Bob Kessler that age perhaps was one of the factors, not necessarily the factor, but among all factors considered in the hiring of a new part-time flex clerk at the Drexel postmaster?

A. No. To expand on the age part of it, we never discussed the age of Frances Kearns, we discussed that her parents were elderly and that she was needing to spend time with them; that she perhaps would not be able to work all the time because she would need to be with her aged parents. That's the way age was in that conversation.

Q. So that I understand why you would have been concerned or communicating about her need to be gone because of the age of her parents, where would you have received that information or?

A. From the postmaster. That if she weren't able to be there and he weren't able to be there as the postmaster, there would be no one to run the office.

Q. And do you remember specifically, I know it would have been a year ago, as best you can recall, what communications you would have had with Mr. Callen as it concerns the age of Frances L. Kearns' parents and her need to be gone?

A. Just what I have told you. Was that she had aged parents and may have to be gone, and that's all.

Q. So he would have communicated that to you?

A. Yes.

Q. Do you recall in any communications to Bob Kessler that you might have made the remark to him that, "Frances is getting up there"?

A. No, I would not have.

*****END OF PAGE 12 OF ORIGINAL*****

*****BEGINNING OF PAGE 29 OF ORIGINAL*****

Q. If you have had communications with the postmaster that concern these questions, then that would be knowledge that you have.

A. I have no knowledge of her attendance.

Q. Do you have any knowledge about any comments that may have been made by her supervisor concerning her work at the Drexel post office?

A. No, I don't. Other than what we have talked about previously in her availability to tend to her aged parents.

Q. Have you made any comments about Frances L. Kearns' work at the Drexel post office?

A. No, I haven't.

Q. Are you aware of any change in Frances L. Kearns' job proficiency since her father went into the nursing home in July of 1991?

A. I didn't know that her father went into a nursing home in 1991.

Q. Are you aware of any change in her job proficiency whatsoever?

A. No, I am not.

*****END OF PAGE 29 OF ORIGINAL*****

*****BEGINNING OF PAGE 31 OF ORIGINAL*****

Q. As it relates to the communications that you had with Mr. Callen about Frances L. Kearns' parents, were you told or was it an assumption that because of those communications she would have to miss work or there could be a possibility that she could miss work?

A. Would you repeat that for me.

Q. As to the communications that you had with Mr. Callen concerning Frances L. Kearns' parents, were you told or was it an assumption or your understanding that because of that she would have a need to miss work?

A. That there may be a need to miss work, not that there would be.

Q. But that there may be a need to miss work because?

A. Of her aged parents.

Q. Which would mean that she would have to?

A. She would not be available all the time is my understanding?

Q. Do you have any idea when those communications would have taken place?

A. Between myself and Mr. Callen?

Q. Yes.

A. No. Other than it was all in the same time frame, same time period. I don't know when that was.

Q. At or around April of 1993, March, April, which were the dates that we had looked at on the documents?

A. As far as I know, those dates are correct. I just don't recall what they are. If that's March or April.

MR. VOGEL: Yes.

Q. (By Mr. Kearns) What reasons were you given by Rod Callen other than the ones that you have indicated previously, or would there be any additional reasons given by Mr. Callen for hiring a part-time flex clerk?

A. None, other than the needs of the office, the need for two people to work.

Q. Would you have been given any reasons by Connie Allen for the need for hiring a part-time flex clerk at the Drexel post office?

A. Would I have been given those reasons?

Q. Yes.

A. No.

Q. How does your position relate to the board, the determination board that we talked about earlier?

A. At that time when that position was approved, I would have given authorization, I would have approved the position based on my knowledge of the office. At that time I would have forwarded it to what was called the complement committee which determined the needs of individual offices. And if that committee determined that the office needs required that position, then it would be approved.

Q. But if I understand you correctly, the request would come to you first?

A. Yes.

Q. And then the protection would be your review and then the additional review from the board?

A. That is correct.

Q. So it would be a two-tiered request system?

A. Yes.

Q. Do you recall the reasons you gave Bob Kessler for

hiring Fran Walley Brown as a part-time flex clerk at the Drexel post office?

A. Just as I have stated. The needs for two people in the office to make distribution in the morning.

Q. And then would there have been any communications with Bob Kessler about the fact that Frances Kearns' parents were elderly and there could be a possibility --

A. Yes, we have already talked about that. Bob and I talked about that on the phone.

Q. And do you recall when that communication would have been or it would have been at or around?

A. All in the same time.

*****END OF PAGE 33 OF ORIGINAL*****

UNITED STATES OF AMERICA
EQUAL OPPORTUNITY COMMISSION,
ST. LOUIS DISTRICT OFFICE

FRANCES L. KEARNS,	)	
	)	
Complainant,	)	
	)	EEOC CASE
vs.	)	No. 2809-44095X
	)	Agency No. R-I-604193
MARVIN RUNYON,	)	
Postmaster General,	)	
United States Postal Service,	)	
	)	
Respondent Agency.	)	

DEPOSITION OF RODNEY A. CALLEN,
produced, sworn and examined on Friday, April 22, 1994, at the United States Postal Service, 315 West Pershing Road, Room 576, in Kansas City, Jackson County, Missouri, before:

JAMES A. LEACOCK, RPR, C.M.,
for
CROSS REPORTING SERVICE, INC.
110 South Main Street
Independence, Missouri 64050

a Notary Public within and for the State of Missouri.
Taken on behalf of the Complainant.

APPEARANCES:

For the Complainant:

MR. DARREN KEARNS
Attorney at Law
6800 College Boulevard, Suite 220
Overland Park, Kansas 66211

For the Respondent Agency:

UNITED STATES POST OFFICE
By: Mr. Randall N. Vogel
315 West Pershing Road, Room 567
Kansas City, Missouri 64108

*****BEGINNING OF PAGE 13 OF ORIGINAL*****

Q. To your knowledge, how many times has Frances Kearns caused the Drexel post office to be closed in the last 28 years?

A. None that I know of.

Q. This concludes my questioning for this witness.

MR. VOGEL: I would like to clarify just a couple of things.

EXAMINATION BY MR. VOGEL:

Q. When I called you -- you have the date, Mr. Kearns, April 15th, last Friday, this was after the pre-hearing conference, I believe.

MR. KEARNS: That is correct.

*****END OF PAGE 13 OF ORIGINAL*****

EQUAL OPPORTUNITY COMMISSION,
ST. LOUIS DISTRICT OFFICE

In the Matter of:

FRANCES L. KEARNS,	)	
	)	
Complainant,	)	
	)	Case No.
and	)	EEOC 280-94-4095X
	)	P.O. 1-I-640193
MARVIN RUNYON,	)	
Postmaster General,	)	
U.S. Postal Service,	)	
	)	
Agency.	)	

U.S. Post Office, Room 567
315 West Pershing Road
Kansas City, Missouri
Monday, May 9, 1994

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m.

BEFORE:

HON. TATJANA VANDERHORST SCHWENDINGER,
Administrative Judge.

APPEARANCES:

On Behalf of the Agency:

RANDY VOGEL, ESQ.
Labor Relations Specialist
United States Postal Service
315 West Pershing Road
Kansas City, Missouri 64108

On Behalf of the Complainant:

DARREN K. KEARNS, ESQ.
8324 West 108th Terrace, #B
Overland Park, Kansas 66210

*****BEGINNING OF PAGE 88 OF ORIGINAL*****

Q. Please tell us about your attendance record or any information you might have concerning that?

MR. VOGEL: Your Honor, we stipulate that there was no problems with Mrs. Kearns' record or attendance. There has never been an issue raised at all.

JUDGE SCHWENDINGER: I don't think they are quarreling with --

MR. KEARNS: I just wanted to make sure that we have made the point because of the documents, or the information that we have on some of our exhibits about the potentially dangerous situation and the unavailability of loaners to work and fill in.

JUDGE SCHWENDINGER: Their position, whether it is an accurate one or a truthful one, I am going to have to determine in the end, but they are asserting that decision had nothing to do with Frances Kearns. They are asserting that there is a fundamental policy that this agency does not prefer to have only one PTF in offices of this size because it wants to avoid the possibility of office closures or those kinds of problems. And, they want to avoid the

possibility that loaners couldn't come. That is their assertion.

They are not asserting that Mrs. Kearns does not work well. They are specifically denying that it had anything to do with complainant's absentee record. They are asserting that it was a policy decision, that they would prefer to have two PTF's in Drexel, avoid the whole loaner problem in its entirety, and that they then would not have to worry at all about: Will we have the manpower, if we need it?

The reason I am saying that is, in my view, given that defense, there is nothing to discuss vis-a-vis absenteeism. There is nothing to discuss vis-a-vis the accuracy of Mrs. Kearns' work, the speed of Mrs. Kearns' work, the courtesy of Mrs. Kearns' work or anything concerning Mrs. Kearns. They are affirmatively denying anything to do with Mrs. Kearns and, on the contrary, are essentially saying, "If John Doe or Susie Que had that job, we would have done the same thing."

As a result, to me, that effectively denies the agency the right now to assert that it had anything to do with Mrs. Kearns, either her productivity or her absenteeism rate.

*****END OF PAGE 89 OF ORIGINAL*****

*****BEGINNING OF PAGE 139 OF ORIGINAL*****

JUDGE SCHWENDINGER: During that conversation, did Mr. Callen mention complainant's parents?

THE WITNESS: He said that she had said that she may need to be gone because her parents were aged, elderly or I cannot remember the term, but that they were older and would need some attention. I don't remember my exact words or his.

We discussed the two hours a pay period which would not be enough for a new employee, for any employee to work and be proficient at what they do, which

*****END OF PAGE 139 OF ORIGINAL*****

*****BEGINNING OF PAGE 141 OF ORIGINAL*****

JUDGE SCHWENDINGER: That Callen felt that two days a week and one Saturday was adequate for complainant and that it was fair?

THE WITNESS: Yes.

JUDGE SCHWENDINGER: That, in addition, Callen indicated to you, or stated to you, that complainant had indicated to him that she said she might need to be gone to take care of her parents?

THE WITNESS: Yes.

JUDGE SCHWENDINGER: Something to the effect to take care of them, that they needed attention or something along those lines.

THE WITNESS: That she may not always be available because of her aged parents.

JUDGE SCHWENDINGER: Because of her aged parents.

Was that the term that was used?

THE WITNESS: I believe so.

*****END OF PAGE 141 OF ORIGINAL*****